

REMARKS

Claims 1- 10 have been canceled without prejudice by this amendment. Upon entry of this amendment Claims 1 – 15 will be pending in this continuation application before the Examiner. Support for the new claims is found in the Specification and Claims as originally filed. No new matter is added.

Rejection of Original Claims 8-10 under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 5,954,231 issued to Durliat et al and by U.S. Patent No. 5,318,203 issued to Iaia et al.

The Examiner rejected Original Claims 8-10 under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 5,954,231 issued to Durliat et al (hereinafter “Durliat”) and by U.S. Patent No. 5,318,203 issued to Iaia et al (hereinafter “Iaia”) in the December 16, 2003 Office Action. Please consider the following arguments in support of the claims added by this amendment.

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a *single* prior art reference.” *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987), MPEP §2131 (emphasis added). “The identical invention must be shown in as complete detail as is contained in the ... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989), MPEP §2131. Applicants assert that neither Durliat nor Iaia teach each and every element of the claimed invention as these references fail to teach the inventive cap and shoulder assembly which includes a cap comprising cap chambers, wherein each cap chamber is a damper to regulate flow of the composition being dispensed, and wherein the shoulder nozzle is received within the cap body.

Rejection of Original Claims 8-10 under 35 U.S.C. §102(b) as anticipated by Durliat

The Office Action states “Durliat et al. teaches of a cap (110) and shoulder (26,28,30,32) assembly, the shoulder having a face (118) with apertures, and the cap (110) having a body (112) with a dispensing orifice having apertures and a divider (see Fig. 8) according to the claims.” (12/16. 03 Final Office Action, Page 2) The Office Action states that “in Figure 7, Durliat et al. clearly shows cap chambers. These chambers have walls against which the material passes and with which a frictional force

is imparted in the opposite direction to the material flows. Therefore, the chambers of Durliat et al. inherently serve as a damper to regulate the flow of the composition being dispensed.” (12/16/03 Final Office Action, Pages 2 and 4)

Durliat states each tube (22, 24) includes a rigid rectangular finish (26, 28), an integral rigid half shoulder (30, 32), and an integral thin flexible body (34, 36). (Specification Col 3, Lines 30-32) Additionally, each shoulder portion (30, 32) includes a flat portion (46, 48) and an arcuate portion (50, 52). (Specification Col 3, Lines 38-40) Therefore, the chambers referred to in Fig. 7 are a combination of the areas of the rectangular finish, and the shoulder of the tube. Durliat also states that “means are provided on the **exterior of the half finish for interengaging a closure.**” (Specification Col 3, Lines 42-44) No cap chambers exist to serve as a damper, as the cap is engaged to the exterior of the half finish and no space results from this assembly to serve as a damper. The open areas in Fig. 7 above (118) include the closure portion (110) which comprises a first closure portion (112) which snaps over the assembled finished (26, 28) respectively, and a second closure portion (114) attached to the first portion by integral hinges. (Specification Col. 4, Lines 24-29) The first closure portion (112) cannot serve as a cap chamber because it is attached to the outside of the half finish, and no space is left for a chamber. The second closure portion (114) cannot serve as a damper because this is hinged cover which is removed from the dispensing orifice prior to dispensing the compositions as seen in Fig. 8.

Therefore, Applicants assert that Durliat fails to teach a cap chamber to serve as a damper for the composition to achieve uniform dispensing. Therefore, Durliat does not teach each and every element of the claimed invention, and Applicants assert that the inventive cap and shoulder assembly is not anticipated.

Rejection of Original Claims 8-10 under 35 U.S.C. §102(b) as anticipated by Iaia

The Office Action states “in figures 1-5 and 8, Iaia et al. teaches of a cap (2) and shoulder (12) assembly, the shoulder having a face (24) with apertures (14), and the cap (2) having a body (4) with a dispensing orifice (50) having apertures (58) and a divider (52) according to the claims.” (12/16/03 Final Office Action, Page 2)

To assemble the inventive cap and shoulder assembly the shoulder nozzle is received into the cap body. (Specification Page 10, Lines 14-16 and Claim 8) Whereas the cap and shoulder assembly of Iaia requires that “each of **nozzles (56) tightly insert** into a respective exit orifice (14) to further secure hollow tubes (10).” (Specification Col. 4, Lines 17-19) As shown in Fig. 4-8 nozzles (56) are located on the cap, and exit orifice

(14) is located on the hollow tube (10). Therefore, Iaia does not teach the inventive cap and shoulder assembly because the **inventive shoulder fits into the cap area**. This allows the compositions to enter the cap chambers, where dampening occurs, resulting in uniform dispensing of the compositions within the tubes. Having extensions of the cap area which fit into the tubes themselves does not necessarily result in the same uniform dispensing of the inventive cap and shoulder assembly, as such Iaia does not expressly or inherently teach every element of the claimed cap and shoulder assembly. "Inherency ... may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient." *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323 (C.C.P.A. 1981).

The Office Action also states that "in Figures 1-3 and 8, Iaia et al. clearly shows cap chambers. These chambers have walls against which the material passes and with which a frictional force is imparted in the opposite direction to the material flows. Therefore, the chambers of Iaia et al. inherently serve as a damper to regulate the composition being dispensed." (12/16/03 Final Office Action, Page 4) As show in Figs. 8 and 4-5 of Iaia the nozzles (56) tightly **insert** into a respective exit orifice (14) of the tube body. Therefore, the only area where the compositions can accumulate is within the divided spout (48). The inventive cap has a divider throughout the cap, not just the spout, creating a greater area for accumulation of the compositions contained within the tubes, resulting in a significant dampening affect. The divided spout of Iaia does not **necessarily** serve as a damper for the compositions contained within the tube, nor is it the same as the inventive cap which comprises a divider throughout the entire cap.

The Office Action also references Col. 2 Lines 50-54 of Iaia, which states "cross-sectional dimensions of the respective nozzles and/or exit orifices for each pair may be of different opening size to allow adjustment for control of component flow, depending upon the flow characteristic of each component." This teaching of Iaia does not disclose having a shoulder extending from the body which is received into the cap chamber. Further, this teaching does not disclose cap chambers to provide a dampening effect.

Applicants respectfully submit that the 35 U.S.C. §102(b) rejection is improper because the references cited by the Examiner in the Office Action do not expressly or inherently contain each and every element set forth in the amended claims. Therefore, Applicant asserts that the 35 U.S.C. §102(b) rejection should be withdrawn, and the Claims should be granted.

Rejection of Original Claims 1 – 7 under 35 U.S.C. §103(a) as obvious over U.S. Patent No. 5,244,120 issued to O'Meara (hereinafter "O'Meara") in view of Iaia.

The Examiner rejected Original Claims 1-7 and 11 - 12, under 35 U.S.C. §103(a) as obvious over U.S. Patent No. 5,244,120 issued to O'Meara (hereinafter "O'Meara") in view of Iaia. Please consider the following arguments in support of the claims added by this amendment.

To establish a *prima facie* case of obviousness under 35 U.S.C. §103(a), three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine reference teachings. Second, there must be a reasonable expectation of success of obtaining the claimed invention based upon the references relied upon by the Examiner in the Office Action. Third, the reference (or references when combined) must teach or suggest all the claim limitations. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). The level of skill in the art cannot be relied upon to provide the suggestion to combine references. Al-site Corp. v. VSI Int'l Inc., 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999). Applicants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness as no suggestion or motivation exists to modify or combine the references to include the inventive multi-chambered tube, the reference cited does not suggest a reasonable expectation of success resulting from using the multi-chambered tube, and finally, not all the claim limitations are included in the references cited by the Examiner in the Office Action.

The Office Action states "O'Meara shows a multi-chambered tube substantially according to Claims 1-7 having a body (13) and shoulder (15), but does not show the cap according to the claims. O'Meara teaches a simple cap (11)." (6/25/2003 Office Action, Page 3) The Office Action further states that "Iaia et al teaches to provide a cap (2) according to the claims that allows simultaneous delivery of a plurality of reactive substances to a single location." (Id.) The Office Action concludes that "it would have been obvious to one having ordinary skill in the art to have substituted the cap (2) of Iaia et al for the cap (11) of O'Meara in order to join the separated apertures of O'Meara to allow simultaneous delivery of a plurality of reactive substances to a single location as taught by Iaia et al." (Id.)

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In re Mills, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). The Office Action states that "examiner has used the teaching in Iaia et al that it is desirable to bring

together compositions to be combined at a point of use rather than separated as shown by O'Meara" as motivation to combine. However, Applicants assert that despite the Examiner's conclusions stated in the Office Action regarding Iaia's teaching of a desire to bring together compositions at the point of use, the Office Action has still failed to point to any teaching in the references suggesting the desirability of combining a cap comprising a dispensing base and cover, with a tube requiring a cap which can be slideably fitted on the discharge end (15) of the tube (13) and has a piercing or puncture means as required by the dual compartment container of O'Meara. O'Meara teaches a "container with two adjacent compartments having a common surface at one end with a thin wall portion at that end for each surface. The cap slideably fits on the end of the container and includes a puncture means or piercers which are in alignment with the walls so that the movement of the cap will cause the piercers to puncture the thin wall portion of each compartment." (Specification Col. 1, Lines 40-48) Iaia does not teach a piercing or puncture means for puncturing a thin wall portion of each compartment, nor is the cap structured to receive a shoulder nozzle. Rather the cap has extensions which protrude and insert into the body of the tube. "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 178, 1784 (Fed. Cir. 1992) (quoting *In re Fine*, 837 F.2d 1071, 1075, 5 USPQ2d 1596, 1600 (Fed. Cir. 1988). Additionally, the Office Action fails to point to any teaching in the reference which suggests the desirability of modifying and combining the references to result in the inventive tube comprising the inventive cap and shoulder assembly including chambers which further regulate the flow of the compositions being dispensed by serving as a damper and further includes a body divider made from a substantially rigid material and is substantially non-displaceable in response to application of compressive force to the body. (Specification, Page 10, Lines 23-25)

No teaching in the cited references suggests a reasonable expectation of success of obtaining the claimed invention. The inventive multi-chambered tube can consistently dispense the different compositions contained in each tube chamber uniformly regardless of how the tube is squeezed. The inventive multi-chambered tube comprises the inventive cap and shoulder assembly and a body divider made from a substantially rigid material that is substantially non-displaceable. (Specification, Page 5, Lines 26-29) The inventive cap and shoulder assembly regulates the flow of the different components of compositions contained in each tube chamber such that the different components are dispensed uniformly from each of the chambers regardless of the rheology and viscosity of the compositions contained within the tube. The tube also dispenses uniformly by incorporating the body divider that is made from a substantially rigid material that is

substantially non-displaceable in response to application of compressive force to the body. Incorporating this body divider results in uniform dispensing regardless of how the tube is squeezed. (Specification, Page 5, Lines 26-29) Therefore, the Office Action has failed to point to a teaching which suggests a reasonable expectation of success of obtaining the claimed invention.

Finally, even if the teachings of Iaia and O'Meara are combined, not all elements of the claimed invention are taught or suggested. No reference teaches the inventive cap and shoulder assembly which comprises a cap chamber that serves as a damper to further regulate the flow of the composition being dispensed and a shoulder nozzle which is received within the cap body. Additionally, no reference cited teaches a body divider made from a substantially rigid material that is substantially non-displaceable in response to an application of compressive force to the body. Therefore, the references cited in the Office Action fail to teach or suggest all the claim limitations.

Applicants assert that the Examiner has failed to establish a *prima facie* case of obviousness, and respectfully request that the obviousness rejection be withdrawn.

Conclusion

In light of the above amendments and remarks, it is requested that the Examiner grant the claims. Early and favorable action in the case is respectfully requested.

Applicants have made an earnest effort to place their application in proper form and to distinguish the invention as claimed from the applied references. In view of the foregoing, Applicants respectfully request entry of the amendments presented herein, and allowance of Claims 1 -15.

Respectfully submitted,
John Geoffrey Chan, et al

By Betty J. Zee
Betty J. Zee
Attorney for Applicant(s)
Registration No. 36,069
(513) 622-3952

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